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IN THE

Supreme Court of the United States

October Term, 1932

No. [redacted] 89

LIFE & CASUALTY INSURANCE COMPANY OF TENNESSEE

Appellant and Petitioner

vs.

OSSIE McCRAY

Appellee and Respondent

BRIEF OPPOSING APPELLEE'S AND RESPONDENT'S MOTION TO DISMISS THE APPEAL PRAYED FOR IN THIS CASE

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BRIEF OPPOSING APPELLEE'S AND RESPONDENT'S MOTION TO DISMISS THE APPEAL PRAYED FOR IN THIS CASE

POINT 1

Appellee contends that this appeal ought to be dismissed; for the reason that this Court in the cases of *Fidelity Mutual Life* v. *Mettler*, 185 U. S., 308; *Iowa Life* v. *Lewis*, 187 U. S., 335; *Home Life* v. *Fisher*, 188 U. S., 626, and *Farmers and Merchants Insurance Company* v. *Dobney*, 189 U. S., 301, has settled all doubt as to the constitutionality of Section 6155 of Crawford & Moses' Digest of Arkansas, imposing a penalty upon insurance companies for failure to pay claims.

The above cases were decided upon two questions:

1. That a State has the right to prescribe whatever conditions it may deem proper as a condition precedent to a corporation of another State entering the State to do business; and,

2. That the placing of a penalty upon insurance companies and no other class of corporations was a class distinction forbidden by the Federal Constitution.

In the case of *Security Mutual Life* v. *Pruitt*, 202 U. S., 264, 50 L. Ed., 1013, this Court held that a State had the right to prescribe as a condition precedent to its admission into the State that it would not remove a case from the State to the Federal Court, but in *Terral* v. *Burke Construction Company*, 257 U. S., 529, 66 L. Ed., 352, this Court reversed that ruling, and held that the right of corporations to resort to a Federal Court could not be abridged by a State statute on the ground that it was a condition precedent to admission to the State. In *Mortensen* v. *Security Insurance Company*, decided on March 27, 1933, Advance Sheets, Vol. 77, No. 11, page 673, this Court expressly held that a State could not prescribe as a condition precedent to admission to the State the condition that an insurance company should not remove a case from a State to a Federal Court.

We, therefore, submit that the above cases relied upon by appellee are no longer applicable so far as relates to the right of an insurance company to resort to any Court in order to defend a suit in good faith.

Likewise the case of *Zioux County* v. *National Surety Co.*, 276 U. S., 239, 72 L. Ed., 549, cited by appellee, has no bearing

upon the contention here made. That case related to the right of the attorneys for the county to have taxed as cost an attorneys' fee, as authorized by Section 6193 of the Nebr. Comp. Stat. The United States Circuit Court of Appeals for the Eighth Circuit held that, inasmuch as Rev. Stat., Sec. 823 and 824 provided what costs should be taxed against litigants in the Federal Court, a State statute in reference to costs would have no application. This Court reversed the Court of appeals on this point. However, the following shows that we have correctly stated the point upon which the Court decided the case:

> "In striking down so much of the judgment as allowed an attorney's fee the Court below was persuaded that Sec. 7811, which provides for an attorney's fee, authorized it only as costs to be taxed in the State Court. As costs in the Federal Courts are regulated *exclusively* by Rev. Stat., Sec. 823 and 824, the Court concluded that *other costs* authorized *only by a State statute*, could not be included in the judgment."

It will thus be seen that this Court in none of the cases mentioned above, relied upon by appellee, considered or decided the point that a State statute could not authorize the assessment of penalties or attorney's fees against an insurance company merely because a judgment might be rendered against it, and without reference to its *bad faith* in denying payment of the claim and resisting suit in Court.

However, this Court did have before it in the case of Supreme Ruling of the *Mystic Circle* v. *Snyder*, 227 U. S., 500, 57 L. Ed., 614, the exact question presented in this case. The Tennessee statute provided a penalty against insurance companies where the failure to pay was in bad faith, and, not-

withstanding this provision, it was contended that the effect of the Tennessee statute was to penalize insurance companies merely because a judgment might be rendered against them. To show that this Court understood the contention as we have thus stated it, we quote the following:

> "But we are asked to look behind the language of the statute and to assume that its effect is to impose the additional liability in the *absence of bad faith*. That is, we are to take the statute as including what it expressly excludes—as allowing what it explicitly denies. The act does not make the *mere refusal* to pay sufficient evidence of bad faith, so as to justify the added recovery; it requires that the *bad faith be shown*, and that the *consequent additional loss be shown*. And the State Court so construed the statute in the application that was made of it in the present case."

In order to show that the Court in the above case considered the very point presented in this case, we quote the following:

> "The statute is aimed, not at the rights secured by the contract, but at *dishonest methods* employed to defeat them. The additional liability is attached to *bad faith alone*. This is the necessary effect of the proviso. It is only when it is 'made to appear to the Court or jury trying the case that the refusal to pay said loss was *not in good faith*' that the added recovery may be had. It must also appear that such refusal *inflicted* '*additional expense, loss, or injury*' upon the policyholder, and it is this *further expense, loss, or injury* that *measures* the amount to be allowed, which is not to exceed 25 per cent of the liability on the policy.
>
> "It cannot be said that this effort to give indemnity

for the *injuries* which would be *sustained* through *perverse methods* and through an *abuse* of the *privileges accorded to honest litigants* imposed a burden upon the enforcement of the contract. Neither the contract nor the existing law which entered into it contemplated contests *promoted in bad faith*, or justified the *infliction of loss* by such means. The State was entitled at all times to take proper measures to prevent the *perversion* of its *legal machinery*, and there was no denial or burdening, in any proper sense, of the existing remedies applicable to the contract by the demand that they be *availed of bona fide*."

We submit that it is certain that the cases of *Terral* v. *Burke Construction Company*, *supra*, and *Mortensen* v. *Security Insurance Company*, *supra*, have definitely decided that a State may not, under the Fourteenth Amendment, deny a litigant, as a condition precedent to admission into the State, the right to resort to *Federal Courts*. We also submit that the case of Supreme Ruling of the *Mystic Circle* v. *Snyder*, *supra*, extends this rule to State Courts, where the refusal to pay the claim or the defense was not in *bad faith*. But if we are mistaken as to the extension of this rule to State Courts by the last named case, it cannot be disputed that the point is now being presented for the first time for the consideration of this Court.

When we consider that it is only by executions and other processes of Courts that property may be taken, it ought to be clear that the right to resort to Courts *honestly and in good faith* is the *very essence* of the Fourteenth Amendment. By a long line of judicial decisions, the maxim of law has been thoroughly established that the right to *tax or the right to regulate is* the *right to destroy*, and, accordingly, if a State

Legislature may impose a penalty merely because a judgment is rendered against an insurance company, it could go further and *deny* such company the *right* to *resort to Courts at all either in the assertion or defense of its rights.* If this could be done, the Fourteenth Amendment would be a useless scrap of paper.

The appellee cited only the cases of *Fidelity Mutual Life* v. *Mettler, supra; Iowa Life* v. *Lewis, supra; Home Life* v. *Fisher, supra; Farmers and Merchants Ins. Co.* v. *Dobney, supra;* and *People of Zioux County* v. *National Surety Co. supra,* as being cases by this Court settling the proposition that a State may constitutionally impose a penalty upon an insurance company merely because a judgment might be rendered against it without reference to *bad faith* in refusing to pay the claim and in defense of the suit. We have heretofore discussed each of these cases, and shown that the point here presented, that is, the *good or bad faith* of the refusal to pay or defend, was not involved in any of them.

On the other hand, we expressly point out that, in the cases of *Standard Life* v. *Rossi,* 35 F. (2), 679, and *Intersouthern Life Ins. Co.* v. *McElroy,* 38 F. (2), 557, the United States Circuit Court of Appeals for the Eighth Circuit has held Sec. 6155 of Moses and Crawford's Digest unconstitutional, if construed to impose penalties merely because a judgment is given, and *without reference to the element of bad faith.*

This conflict between these Courts, covering the same territory, is recognized by the Supreme Court of Arkansas in the present case in its opinion as follows:

> " . . . but assuming appellant defended in *good faith,* this does not excuse it from the plain provisions of the

statute. *Security Ins. Co.* v. *Smith*, 183 Ark., 254, 35 S. W. (2d), 581; *Mut. Life Ins. Co.* v. *Marsh*, 185 Ark., 332, 47 S. W. (2d),585, *where we expressly refused to follow the Circuit Court of Appeals* in *Standard Acc. Ins. Co.* v. *Rossi*, 35 Fed. (2d), 667, and *Inter-Southern Life Ins. Co.* v. *McElroy*, 38 Fed. (2d), 557. This question is now settled and we decline to reconsider the matter."

This conflict between these two Courts, covering the same territory, is one that ought to be settled by this Court, and in itself presents sufficient reason why this appeal ought to be sustained and the motion to dismiss ought to be disallowed.

POINT 2

The point involved in this case on its merits is from *what date* do the provisions of a policy commence to run where it has *lapsed and been reinstated?* Does it begin to run from the date of the policy itself, or from the date of the *reinstatement?*

Appellant is a Tennessee corporation, and, prior to the issuance of this policy, the Supreme Court of Tennessee, in the case of *Insurance Company* v. *Galbraith*, 115 Tenn., 477, held that, under these circumstances, the policy began to run anew from the date of the reinstatement as shown by the following quotation:

"It is well settled that a policy is forfeited by its terms if the premium (or any note given for it) is not paid at maturity. *Thompson* v. *Life Ins. Co.*, 104 U. S., 252, 86 L. Ed., 765; *Ressler* v. *Life Insurance Company*, 110 Tenn., 411, 75 S. W., 735.

"The effect of nonpayment of the premium is made

clear by the policy itself. As is said in *Lantz* v. *Insurance Co.*, 139 Pa., 546, 21 Atl., 81, 10 L. R. A., 577, 23 Am. St. Rep., 202: 'It declares that, if not paid on the days named and in the lifetime of the insured, the policy shall cease and determine. . . . It ceases to bind the company and to protect the assured, and this without any act or declaration on the part of the former. It does not require a formal forfeiture. . . . As to him (the assured) it is a dead policy. It is true that it may be restored to life by the subsequent payment of the premium and its acceptance by the company. This, however, is a new contract, by which the company agrees in consideration of the premium to continue in force a policy which had previously expired; in other words, it is a new assurance, though under the former policy.'

"This it seems to us, is a clear statement of the want of relationship of the parties during the lapse of a policy like the one in question; and of the character of the new relations which grow out of its reinstatement. While in a state of absolute collapse, the former owner of the policy has neither a legal nor an equitable claim on the company. By his failure to comply with the conditions upon which it could be kept alive he has *ipso facto* forfeited all rights under the policy. As to him, it is as if it had never been written. If any benefit is to accrue to him therefrom, it must be revitalized, and this can only be done with the consent of the company. When it is done, then it becomes a new assurance—a new contract—as if the policy then was for the first time issued. If this be its nature, then it must operate in the future from the date of its reinstatement, and whatever might be its original date, or howsoever long it may have run, yet it would seem, by the force of necessary logic, to follow that the incontestable clause would begin its new life with the date of the new contract. And it would seem also to be as certainly true that if the assured obtained the reinstatement by fraud, or by false

warranties material to the risk, during the period reserved for contest, the company should be allowed to protect itself against such unfair dealing.

"In *Bottomley* v. *Insurance Company*, 170 Mass., 274, 49 N. E., 438, it is said that a revived policy of life insurance does not go into effect if a declaration or warranty contained in the application therefor is untrue. This statement, however, must be taken with the modification that if the policy contains a time limit, beyond which it is incontestable, when that limit is passed, then, unless fraud is within the class excepted from the operation of the clause fixing the limit, it is no longer a defense, but the policy is then affected notwithstanding the fraud."

The law is well settled that, where the language of an insurance policy has been construed by the Supreme Court of the Home State of the corporation, the *interpretation* placed by that Court upon such language becomes as much a *part of the policy* as if it were expressly *set out therein*, as held by the following cases:

Armour Packing Co. v. *U. S.*, 82, C. C. A., 135, 153 F. 1, Eighth Circuit, 14 L. R. A. (N. S.), 415:

"But the contention that the contract was valid, and that its performance was enforceable after the higher rates were filed and published, ignores a basic rule of the interpretation of agreements and *material* part of the contract. That rule is that *all laws* in existence when an *agreement is made* necessarily *enter into and form* a part of it as fully as if they were *expressly referred to or incorporated into its terms. Von Hoffman* v. *Quincy* (*United States ex rel. Von Hoffman* v. *Quincy*), 4 Wall., 535, 550, 18 L. Ed., 403, 408; *Rees* v. *Watertown*, 19 Wall., 107, 121, 22 L. Ed., 72, 76; *Edwards* v. *Kearzey*,

96 U. S., 595, 601, 24 L. Ed., 793, 796; *Seibert* v. *Lewis* (*Seibert* v. *United States*), 122 U. S., 284, 295, 30 L. Ed., 1161, 1165, 7 Sup. Ct. Rep., 1190; *Southern R. Co.* v. *Bouknight*, 30 L. R. A., 823, 17 C. C. A., 181, 185, 25 U. S., App., 415, 70 Fed., 442, 446."

Seibert v. *U. S.*, 122 U. S., 284, 30 L. Ed., 1165:

"It is well settled by the decisions of this Court that 'The remedy subsisting in a State, when and where the contract is made and is to be performed, is a *part of its obligation*, and any subsequent law of the State which so affects that remedy as substantially to impair and lessen the value of the contract is forbidden by the Constitution and is therefore void.' *Edwards* v. *Kearzey*, 96 U. S., 595, 607 (24: 793, 798)."

Section 6132 of the Tennessee Code of 1932 provides:

"*No Discriminations in Favor of Insurants Allowed; Contract to Be Expressed in Policy.*—No life insurance company doing business in Tennessee shall make or permit any *distinction* or *discrimination* between *insurants of the same class* and equal expectation of life in the amount or payment of premiums, or rates charged for policies of life or endowment insurance, or in the dividends or other benefits payable thereon, or in *any other of the terms and conditions of the contracts* it makes; nor shall any such company, or any agent thereof, make any contract of insurance or agreement as to such contract other than is plainly expressed in the policy issued thereon; nor shall any such company or agent pay or allow, or offer to pay or allow, as an inducement to insurance, any rebate of premiums payable on the policy, or any special favor or advantage in the dividends or other benefits to accrue thereon, or any valuable consideration or inducement whatever, not specified in the policy contract of insurance."

Therefore, as to Tennessee policyholders, there could be no recovery under the facts of the present case; for the reason that the suicide occurred within one year from the date of the reinstatement, and, if the Company had paid this claim to a citizen of Arkansas on the theory that the suicide clause began to run from the date of the policy, and not from the date of the reinstatement, a discrimination against Tennessee policyholders would result, and appellant would clearly be in violation of the above Tennessee statute and be liable to fine and to have its charter revoked.

Section 322 of the Digest of Insurance Laws of Arkansas, being Sec. 10 of the Act 493 of 1921, is as follows:

> "It shall be unlawful for any life insurance company doing business in this State to *permit distinction or discrimination* between *individuals of the same class or of equal expectation of life* in the amount of payment of *premiums, rates, dividends, benefits, terms* or *conditions* of contracts of life or endowment insurance; nor shall any life insurance company, or agent thereof, make any contract except as is plainly expressed in the policy of insurance; nor shall any life insurance company, officer or agent thereof, pay, offer to pay, directly or indirectly, as an inducement to insurance, any rebate of premiums on the policy of insurance, or any other thing of value whatsoever not specified in the policy contract. Any company or agent violating the provisions of this Section shall be deemed guilty of a misdemeanor, and, upon conviction, shall be punished by a fine of not less than one hundred dollars nor more than five hundred dollars, and the Commissioner shall cancel the right of the company, or agents convicted, to transact business in this State for a period of one year. Provided, the company shall not be held liable under this Section for any act of its agents

unless such act was authorized by one of its officers, State managers, State or general agents.—Sec. 10, Act 493, of 1921."

It will be noted that the Tennessee and Arkansas statutes above quoted are in almost identical language, both expressly prohibiting under extreme penalties, appellant from *discriminating between policyholders*. It will be also noted that the prohibition under the Arkansas statute does not limit this discrimination to *Arkansas policyholders*, but to policyholders in general. Accordingly had appellant paid the present claim, it, as aforesaid, would have been a discrimination against Tennessee policyholders, and it would have violated both the Tennessee and Arkansas statutes.

In other words, the same identical contract with the same identical words would mean one thing in Tennessee and another in Arkansas, which necessarily means that the Arkansas policyholder would be paid a claim denied to the Tennessee policyholder, thus presenting a clear case of discrimination.

By paying this claim, thus discriminating against Tennessee policyholders and violating both of the said anti-discrimination statutes of Arkansas and Tennessee, appellant would have created a situation where it would have violated the above Tennessee statute, and would under the Arkansas statute have subjected itself to a fine of $100.00 to $500.00, and where it would be mandatory upon the Commissioner of Insurance of Arkansas to cancel appellant's rights to do business in that State.

The case of *New York Life Ins. Co.* v. *Adams*, 151 Ark., 123; *Security Life* v. *Leeper*, 171 Ark., 77, and *Equitable Life*

v. *King*, 178 Ark., 293, relied upon by appellee as deciding the above identical question, do not apply in the remotest degree.

The question in those cases was whether or not after a policy had lapsed, the company could impose any *new* conditions as a condition precedent to reinstatement. The points here involved were not discussed at all, that is, the meaning of the terms of the *original* policy construed in the light of *Tennessee decisions*, and especially in reference to the said anti-discrimination statutes of Tennessee and Arkansas. Accordingly, it is clear that the point involved in this suit had not prior to the present case been decided by the Supreme Court of Arkansas.

Therefore, we submit that the decision and judgment of the Supreme Court of Arkansas violates the Federal Constitution in the following particulars:

1. Art. 4, Sec. 1:

> "Section 1. Full faith and credit shall be given in each State to the *public acts*, records, and *judicial proceedings* of every other State. And the Congress may by general laws prescribe the manner in which such acts, records and proceedings shall be proved, and the effect thereof."

The Public Acts of Tennessee, Sec. 6132, expressly provides that appellant shall not discriminate between policyholders and the interpretation of the contract in this case by the Arkansas Supreme Court compels this Company to pay a claim in Arkansas that it is expressly forbidden to pay in Tennessee, both by the Tennessee and Arkansas anti-discrimination statutes, and in violation of both statutes to make the same iden-

tical contract with the same identical words mean one thing in Tennessee and another in Arkansas. Appellant had a vested right not only in this contract as construed under Tennessee law which it was compelled under the Tennessee anti-discrimination law to apply equally among insurants, but it also had a vested right in the said Arkansas anti-discrimination law, in that the Supreme Court of Arkansas could not constitutionally compel it to do a thing which under the Arkansas statute, subjected it to severe fines, and made mandatory the cancellation of its right to do business in that State. Also the decision in *Galbraith* v. *Ins. Co.*, 115 Tenn., 477, holding that under the language of this particular policy, it began to run anew from the *date of the reinstatement*, constitutes a judicial proceeding, which *became a part of the contract itself*, as has been before stated. Accordingly, the Supreme Court of Arkansas did not follow either the Public Acts or the judicial proceedings of the State of Tennessee in this matter, nor give "full faith and credit" to either.

2. As heretofore shown, the interpretation of the Tennessee Supreme Court in the Galbraith case became a part of this policy and the later decision and judgment of the Arkansas Supreme Court giving the contract an entirely different meaning, constitutes a "*subsequent law* of the State which so affects that remedy as substantially to impair and lessen the value of the contract is forbidden by the Constitution and is therefore void," as was held in *Edwards* v. *Kearzey*, 96 U. S., 595, 607 (24: 793, 798).

Section 10, Subsection 1 of the Federal Constitution provides: "No *State*" shall make a law impairing the obligation of contracts and the Fourteenth Amendment expressly prohibits "any *State*" from taking property without due process of

law. The word "State" includes both the Legislative and Judicial Departments.

A judgment of a Court may violate the Constitution in the same manner as the Act of the Legislature.

Taylor on Due Process of Law, page 264, says:

> "But while it is thus settled that erroneous decisions of a State Court do not deny due process so long as they are limited to questions involving conformity with the Constitution and laws of the State, the fact remains that such *decisions must not deprive a person of those fundamental rights which the Federal Constitution guarantees.* Such rights must not be abridged either by the law which the Court is administering or by the *conduct of the Court itself* while acting under it."

This Court in *Woodson* v. *Railroad*, 134 U. S., 614, expressly held that the judgment of the Tennessee Supreme Court was void under the Fourteenth Amendment in holding that a judgment was valid where not supported by any evidence.

The Arkansas Supreme Court in this case in the following words recognized the right of appellant to so word its policy as to make it run anew from the date of the reinstatement:

> "Time is to be reckoned 'from the date of issue of this policy,' not from the date of reinstatement, nor from the date of any other policy. *No doubt appellant could have so worded its policy*, but it has not seen fit to do so."

We point out again that this policy was in fact *so worded;* for the reason that the identical words used in the policy had

theretofore by the Supreme Court of Tennessee in the Galbraith case been held to mean that the policy began to run anew from the date of the *reinstatement*, and this policy, having been issued after said decision, the interpretation placed upon these words by the Supreme Court of Tennessee became as much a part of the contract as if actually expressed therein, and consequently the policy was "*so worded*," and the Arkansas Supreme Court erred in failing and refusing to give it *this interpretation*.

We are not in any way attempting to deny the stipulation that the policy in suit was an Arkansas contract. However, we do point out that this stipulation is meaningless, inasmuch as the said Arkansas anti-discrimination statute expressly forbids this Company to pay an Arkansas policyholder a claim which could not be paid to a Tennessee policyholder, and accordingly the laws of Tennessee and Arkansas are identical on this point.

We, therefore, submit that appellant is entitled to have its appeal sustained, inasmuch as it presents the constitutionality of Section 6155 of Crawford & Moses' Digest of the statutes of Arkansas on points not heretofore adversely passed upon by this Court, and that the motion of appellee to dismiss the appeal should be disallowed.

All italics are ours.

Respectfully submitted,

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